

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMILY FLINT and DANIEL S. FLINT,
SR., individually and as parents
and natural guardians of DANIEL
FLINT, a minor child,

Petitioners,

vs.

Case No. 15-0687N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

HERNANDO HMA, INC., d/b/a
BAYFRONT HEALTH SPRING HILL AND
C. MICHELLE HALE, C.N.M.,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon a Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Association (NICA), on February 5, 2016.

STATEMENT OF THE CASE

On February 5, 2015, Petitioners, Emily Flint and Daniel S. Flint, Sr., on behalf of and as parents and natural guardians of Daniel Flint (Daniel), a minor, filed an Involuntary Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq.

(Petition), with the Division of Administrative Hearings (DOAH). The Petition alleged that Daniel suffered brain damage and related neurological disorders as a result of a birth-related neurological injury.

The Petition named Mohammed A. Tabbaa, M.D., as the physician providing obstetric services at the birth of Daniel at Bayfront Health Spring Hill, f/k/a Spring Hill Regional Hospital in Spring Hill, Florida. The Petition also named Samir Shakfeh, M.D., as a physician potentially providing obstetrical services to Emily Flint, and C. Michelle Hale, CNM, as a certified nurse midwife who was present at Daniel's birth.

DOAH served Bayfront Health Spring Hill with a copy of the Petition on February 17, 2015. DOAH served NICA and Mohammed A. Tabbaa, M.D., with a copy of the Petition on February 18, 2015. NICA served C. Michelle Hale, CNM, with a copy of the Petition on March 4, 2015. DOAH served Samir Mohammed Shakfeh, M.D., with a copy of the Petition on March 23, 2015.

On April 15, 2015, Hernando HMA, Inc., d/b/a Bayfront Health Spring Hill, filed a Motion to Intervene, which was granted by Order dated April 24, 2015. On June 18, 2015, C. Michelle Hale, CNM, filed a Motion to Intervene, which was granted by Order dated June 26, 2015.

As of this date, neither Dr. Shakfeh nor Dr. Tabbaa, has petitioned to intervene in this proceeding.

On June 3, 2015, NICA filed a response to the Petition, giving notice that the injury does not "meet the definition of a 'birth-related neurological injury' as defined in section 766.302(2), Florida Statutes, which specifically requires that the injury render 'the infant permanently and substantially mentally and physically impaired.'" NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

A final hearing was scheduled for March 8 and 9, 2016. On February 5, 2016, NICA filed a Motion for Summary Final Order, asserting that Daniel did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. The Motion was served on all counsel of record electronically. In the Motion, NICA advised that neither Petitioners nor Intervenor C. Michelle Hale, CNM, opposed the Motion. To date, Intervenor Bayfront Health Spring Hill has not filed a response to the Motion.

FINDINGS OF FACT

1. Daniel Flint was born on May 3, 2014, at Bayfront Health Spring Hill in Spring Hill, Florida. Daniel weighed in excess of 2,500 grams at birth.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Daniel's medical records. In a medical report dated June 2, 2015, Dr. Willis made the following findings and expressed the following opinion:

In summary, fetal bradycardia developed during labor and required emergency Cesarean delivery. The baby was severely depressed at birth with Apgar scores of 0 at one and five minutes. A heart rate was not present until after 10 minutes of vigorous resuscitation. The initial blood gas was consistent with acidosis. The base was -22. Seizures occurred within the first hour of life. The baby was diagnosed with HIE and managed with whole body cooling.

The baby was found to have a single mutation for the Prothrombin II mutation. I do not believe this was a factor in the oxygen deprivation at birth.

There was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post delivery period. Seizure activity shortly after birth would be consistent with brain injury as a result of the oxygen deprivation. I am unable to comment about the severity of the brain injury.

3. Dr. Willis' opinion that there was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post-delivery period, and that seizure activity shortly after birth would be consistent with brain injury as a result of oxygen deprivation is credited.

4. Respondent retained Michael Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to evaluate Daniel. Dr. Duchowny reviewed Daniel's medical records and performed an independent medical examination on him on May 13, 2015.

Dr. Duchowny made the following findings and summarized his evaluation as follows:

In SUMMARY Daniel's neurological examination reveals very mild plantar-grade foot positioning without corroborating evidence of increased muscle tone. The elevated (3+) knee jerks are consistent with an extremely mild spastic diparesis. He additionally evidences borderline microcephaly. I was surprised by this finding as his head appeared normal to inspection; I re-measured the head circumference several times to confirm. Daniel's motor impairment is judged to be mild and I did not find evidence of many [sic] mental impairment.

A review of medical records sent on April 16th reveals that following Daniel's birth at Bayfront Health at Springhill Hospital at 38 4/7 weeks gestation he was transferred to All Children's Hospital. Because of concern over low Apgar scores of 0, 0, 2, 4 and 5 at 1, 5, 10, 15 and 20 minutes, lethargy and tremors, he was placed in a hypothermic protocol at 1 hour of life which was formally implemented upon arrival at All Children's Hospital. Daniel underwent total body cooling for 3 days. He developed seizures within 35 minutes of delivery and was treated with phenobarbital. Dopamine and hydrocortisone were administered. His nursery course was complicated by MRSA colonization which stabilized. He was found to be heterozygous with a prothrombin gene mutation.

An MRI scan of the brain obtained on May 12 revealed a questionable area of thrombosis but a repeat MRI scan on May 22 was significant only for enlarged extraaxial spaces.

In summary, Daniel has done remarkably well and now has only a very mild motor impairment affecting his gait and to a lesser degree his

oroalimentary coordination. His head growth is borderline. I believe the hypothermia protocol played a role in improving his long-term prognosis. Daniel does not have either a substantial mental or motor impairment and I am not recommending him for consideration within the NICA Program.

5. Dr. Duchowny was deposed on January 15, 2015, wherein he testified in pertinent part as follows:

Q. Okay. All right. And these records discuss and describe certain issues, and I know you said you read the mom's deposition. She raised some issues about the child's coordination running or about some of the swallowing issues.

Is it fair to say that any issue that's been raised, either by Mom in her deposition or by any of the health care providers in the records that you reviewed or any issues that you noted in your report, are all related to this developmentally based disorder that was established in utero?

A. That's what I believe, yes.

Q. And is that your opinion within a reasonable degree of medical probability?

A. It is.

* * *

Q. Doctor, are you familiar with the term or definition of birth-related neurological injury as it's used with Chapter 766 of the Florida Statutes?

A. I believe so, yes.

Q. Okay. So I want to ask you then: Do you have an opinion whether Daniel is permanently and substantially mentally and physically impaired?

MS. DAWSON: Form

THE WITNESS: I do

BY MR. GRACE:

Q. What's that opinion Doctor?

A. I do not believe that he has a substantial mental or physical impairment.

Q. And just in summary fashion - I'm not asking for you to re-testify about all your prior opinions. But in summary fashion, tell us the basis for that opinion and where you gathered your support.

A. It's because I believe that Daniel's motor dysfunction is mild and primarily is associated with incoordination which will improve over time. And I also believe that his delayed expressive language development will also improve over time. So they're mild now and will continue to improve. Therefore, neither domain represents a substantial impairment.

Q. Is that opinion given within a reasonable degree of medical probability?

A. Yes.

Q. Doctor, in response to Mr. Valenzuela's question, you briefly touched on MRI scans that were done. Did you review the actual films, or did you rely on the reports?

A. I can't recall. I have not reviewed them recently. If I had to guess, I would say that I relied on the reports at that time, but I honestly can't recall.

Q. Okay. There were two scans done. And with regard to those scans, you indicated in your report on page 5 there was a questionable area of thrombosis?

A. Yes, that was on the first one I believe.

Q. All right, what is thrombosis?

A. Blood clot.

Q. And are you able to tell us what you attribute that clot to?

A. I don't know.

Q. Then there was a repeat MRI scan done on May 22nd, correct?

A. Yes sir.

Q. All right. And what were the findings on that?

A. That showed no abnormalities in the brain, no evidence of thrombosis, and an extra-axial collection of fluid, meaning a collection of fluid outside the brain, not within the brain substance itself.

Q. With regard to your opinion that Daniel has not suffered a birth-related neurological injury, did you rely on these MRI's to formulate that opinion?

A. Yes, that was one component.

Q. Okay. And how did you rely on these? What's the significance?

A. Well, I don't think it's -- that you can rely on any one aspect. What I did was factor the findings on the MRI with the history and with my findings on physical examination as well as the history of Daniel's development. Putting all of that information together, in my opinion, yields a consistent pattern and diagnosis of developmental delay.

I thought Daniel's examination revealed developmental findings, as I've stated

previously. And the fact that his follow-up MRI showed no evidence of a structural brain injury, in my opinion, supported that diagnosis.

6. Dr. Willis is of the opinion that there was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the post-delivery period, and that seizure activity shortly after birth is consistent with brain injury as the result of oxygen deprivation. However, in order for a birth-related injury to be compensable under the Plan, the injury must meet the definition of a birth-related neurological injury and the injury must have caused both permanent and substantial mental and physical impairment.

7. Dr. Duchowny's opinion that Daniel does not have a substantial mental or physical impairment is credited.

8. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Duchowny that Daniel does not have a substantial mental and physical impairment. While Daniel has some deficits, these deficits do not render him permanently and substantially mentally and physically impaired.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2014).

10. The Plan was established by the Legislature "to provide compensation on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." § 766.301, Fla. Stat. The Plan applies only to a birth-related neurological injury, which is defined in section 766.302(2) as follows:

"Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality. (emphasis added).

11. The injured infant, her or his personal representative, parents, dependents, and next of kin, may seek compensation under the plan by filing a claim for compensation with DOAH.

§§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. The Florida Birth-Related Neurological Injury Compensation Association, which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury."

§ 766.305(4), Fla. Stat.

12. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the Administrative Law Judge to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned Administrative Law Judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

13. In discharging this responsibility, the Administrative Law Judge must make the following determinations based upon all available evidence:

(a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.302(2).

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

§ 766.309(1), Fla. Stat. An award may be sustained only if the Administrative Law Judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth."

§ 766.31(1), Fla. Stat.

14. In the instant case, Petitioners filed a claim alleging that Daniel did sustain a birth-related neurological injury that is compensable under the NICA plan. As the proponent of the issue of compensability, the burden of proof is upon Petitioner.

§ 766.309(1)(a), Fla. Stat. See also Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977) ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal").

15. While Dr. Willis established that there was an apparent obstetrical event which resulted in loss of oxygen to Daniel's brain during the delivery process and continuing into the immediate resuscitation period that resulted in brain injury, the remaining issue to be determined is whether the injury resulted in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997).

16. The evidence, which is not refuted, established that Daniel does not have a permanent and substantial mental or physical impairment. Thus, Daniel is not entitled to benefits under the Plan.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

That the Petition filed by Emily Flint and Daniel S. Flint, Sr., on behalf of and as parents and natural guardians of Daniel Flint, a minor child, is dismissed with prejudice, and the final hearing scheduled for March 8 and 9, 2016, is cancelled.

DONE AND ORDERED this 18th day of February, 2016, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of February, 2016.

COPIES FURNISHED:
(via certified mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7014 1200 0002 3336 2736)

Henry Valenzuela, Esquire
Valenzuela Law Firm P.A.
100 North Tampa Street, Suite 2350
Tampa, Florida 33602
(eServed)
(Certified Mail No. 7014 1200 0002 3336 2743)

Robert J. Grace, Esquire
The Bleakley Bavol Law Firm
15170 North Florida Avenue
Tampa, Florida 33613
(eServed)
(Certified Mail No. 7014 1200 0002 3336 2750)

Mindy McLaughlin, Esquire
Burton, Beytin & McLaughlin
201 North Franklin Street, Suite 2900
Tampa, Florida 33602
(eServed)
(Certified Mail No. 7014 1200 0002 3336 2767)

Denise L. Dawson, Esquire
Hall Booth Smith, PC
Second Floor, Suite H
9250 Alternate A1A
North Palm Beach, Florida 33403
(eServed)
(Certified Mail No. 7014 1200 0002 3336 2620)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7014 1200 0002 3336 2644)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7014 1200 0002 3336 2651)

C. Michelle Hale, CNM
All Women's Midwifery and Health Care
4065 Mariner Boulevard
Spring Hill, Florida 34609
(Certified Mail No. 7014 1200 0002 3336 2668)

Mohammed A. Tabbaa, M.D.
11373 Cortez Boulevard, Suite 408
Spring Hill, Florida 34613
(Certified Mail No. 7014 1200 0002 3336 2675)

NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).